

June 14, 1999

Mr. William E. Kennard
Chairman
Federal Communications Commission
445 12th St., S.W.
Room 8- B201
Washington, DC 20554

RE: *Ex Parte* Presentation in a Non-Restricted Proceeding
Initial Regulatory Flexibility Analysis of
In re Inter-Carrier Compensation for ISP-Bound Traffic (CC Dkt. 99-68)

Dear Chairman Kennard:

As part of its statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory enforcement Fairness Act of 1996 ("SBREFA"),¹ the Office of Advocacy, U.S. Small Business Administration ("Advocacy") submits the following comments in response to the initial regulatory flexibility analysis of *In re* Inter-Carrier Compensation for ISP-Bound Traffic, *Notice of Proposed Rulemaking*, CC Dkt. 99-68, FCC 99-38 (rel. Feb. 26, 1999) ("NPRM").

Advocacy applauds the Commission's recognition that it does not have an adequate record to adopt a rule regarding inter-carrier compensation and consequent decision to initiate a rulemaking.² In a letter addressed to the Commission dated November 6, 1998, Advocacy recommended that Commission undertake this issue through a rulemaking proceeding.³ The Commission's decision to issue a notice of proposed rulemaking is a well-reasoned one, and the Commission will benefit from the public comment received.

An agency is required to prepare and make available to the public an initial regulatory flexibility analysis ("IRFA") when it publishes a general notice of proposed rulemaking.⁴ This analysis must describe the impact of the proposed rule on all small entities. To provide agencies with guidance, Congress listed six specific subjects that must be addressed as part of the IRFA. Each IRFA must include: (1) the reasons why the action is being considered; (2) the objectives and legal basis for the proposed rules; (3) a description and estimate (if feasible) of the number of effected small entities; (4) projected reporting, recordkeeping, and other compliance requirements (including professional skills necessary); (5) identification of any Federal rules

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² NPRM, para 28.

³ Letter from Jere W. Glover, Chief Advocate, Office of Advocacy, U.S. Small Business Administration, to William E. Kennard, Chairman, Federal Communications Commission, CC Docket No. 98-79 (filed Nov. 6, 1998).

⁴ 5 U.S.C. § 603.

which duplicate, overlap, or conflict with the proposed rules; and (6) any significant alternatives to the proposed rules which minimize any significant impact of the proposed rule.⁵

Advocacy has found two aspects of the Commission's IRFA insufficient to satisfy the statutory requirements of the RFA. First, the Commission did not accurately identify all small entities affected by the rulemaking. Second, the Commission did not consider alternatives to minimize the impact upon small entities.

Small Entities Affected

The Commission failed to identify accurately all small entities affected by the rulemaking when it refused to characterize small incumbent local exchange carriers ("ILECs") as small businesses and did not include small Internet Service Providers ("ISPs") in its description of small entities affected. Advocacy addressed the issue of small ILECs as small businesses in a separate comment and will not repeat its objection here.⁶

Advocacy believes that the Commission should consider the impact on small ISPs in this IRFA. The NPRM proposes regulations that directly affect these small entities. Specifically, the Commission proposed rules that would alter the nature of reciprocal compensation agreements covered by interconnection agreements.⁷ The Commission has proposed an unreviewable arbitration process.⁸ Furthermore, the Commission is proposing to separate intrastate ISP-bound traffic from interstate ISP-bound traffic for regulatory purposes.⁹ Both of these proposals would have a direct and substantial impact on small ISPs.

As information services and telecommunications become more entwined as technology develops, it is appropriate that the Commission consider the impact that its regulations will have upon this nascent industry. This makes it crucial that the Commission consider the impact on small ISPs from its rulemakings.

The U.S. Small Business Administration has classified ISPs as small under SIC code 7375 having assets of less than \$18 million.¹⁰ Based on firm size data provided by the Bureau of the Census, 3123 firms are small under SBA's \$18 million size standard in SIC 7375.¹¹ This is a significant number of small entities which should be considered explicitly by the Commission in this and future rulemakings.

⁵ *Id.*

⁶ See Comments of the Office of Advocacy, U.S. Small Business Administration, *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *First Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 98-147, FCC 99-48; *In re* Defining Primary Lines, *Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. 97-181, FCC 99-28; *In re* Inter-Carrier Compensation for ISP-Bound Traffic, *Notice of Proposed Rulemaking*, CC Dkt. 99-68, FCC 99-38 (filed May 27, 1999).

⁷ NPRM, paras 29-32.

⁸ NPRM, para. 32.

⁹ NPRM, para. 36.

¹⁰ 13 CFR § 121.201.

¹¹ Office of Advocacy, U.S. Small Business Administration, Firm Size Data by Industry and Location <http://www.sba.gov/advo/stats/int_data.html> (last visited June 1, 1999).

Regulatory Alternatives

Section 603(c) of the RFA requires the Commission to include in the IRFA a description of any significant alternatives which accomplish the stated objective and minimize any significant economic impact on small entities.¹² Section 603(c) then lists four significant alternatives that the analysis *shall* discuss: (1) differing compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) exemption from all or part of the rule.¹³

In the IRFA, the Commission did not discuss any alternatives to the proposal to require incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”) to discern the amount of traffic carried on their networks that is bound for ISPs. Instead, the Commission noted that all incumbent ILECs and CLECs, including small ILECs and CLECs, would be able to receive compensation for the delivery of ISP-bound traffic. This is not sufficient to satisfy the Commission’s statutory obligation.

Based upon this IRFA, Advocacy believes that the Commission misunderstands the intention of this section of the RFA. Even if a rule provides a benefit to the regulated entities, including small entities, the agency must take into account the regulatory burden imposed and seek alternatives that minimize the burden while accomplishing the same goals. Therefore, the Commission must consider alternatives to the proposal to require ILECs and CLECs to discern the amount of traffic carried on their networks that is bound for ISPs which less the burden while accomplishing the same goal.

Conclusion

Advocacy requests that the Commission revise its IRFA which should be submitted for public notice and comment. Included in this revised IRFA should be a description of ISPs and ILECs as small entities affected by the proposed rules. The Commission should also include consideration of the four alternatives enumerated by Congress in the RFA. By revising these two sections of the IRFA, the Commission can bring this rulemaking in compliance with the Regulatory Flexibility Act.

Sincerely,

Jere W. Glover
Chief Counsel
Office of Advocacy

Eric E. Menge
Assistant Chief Counsel
for Telecommunications

cc: Honorable Susan Ness
Honorable Michael Powell
Honorable Harold Furchtgott-Roth

¹² 5 U.S.C. § 603(c)

¹³ *Id.* (emphasis added).

Honorable Gloria Tristani
Lawrence Strickling
Jane Jackson
Tamara Preiss